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In The

Supreme Court of the United States

October Term 1996

RONALD MANDRGOC,

Petitioner,

v.

PATAPSCO & BACK RIVERS RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Did the opinion of the Fourth Circuit fail to observe a longstanding rule of law concerning the application of the *res ipsa loquitur* doctrine in a Federal Employers' Liability Act 45 U.S.C. §51 et. seq. (FELA) case where evidence of a derailment was presented?

2. Did the opinion of the Fourth Circuit fail to interpret a rule of evidence consistent with other courts of appeals when it affirmed the exclusion of evidence of four prior derailments occurring within a two week period of the accident within an area of 300 feet of this occurrence?

PARTIES TO THE PROCEEDING

Petitioner, Ronald Mandrgoc is a resident of Maryland. He was the Plaintiff in the lower court proceedings of this case and was the Appellant before the United States Court of Appeals for the Fourth Circuit.

Respondent, Patapsco & Back Rivers Railroad Company is a corporation organized and existing under laws of Pennsylvania. Respondent was a Defendant to the action in the lower court proceedings and was also the Appellee before the United States Court of Appeals for the Fourth Circuit.

There are no other parties to this action.

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PETITION FOR WRIT OF CERTIORARI

Ronald Mandrgoc, respectfully petitions the United States Supreme Court to issue a Writ of Certiorari to review the judgment entered in this action by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit giving rise to this action is unpublished but is reprinted at App. 1 through 15.

The order of the United States District Court for the District of Maryland is reprinted at App. 18 through 19.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on August 23, 1996. (App. 1-15). Ronald C. Mandrgoc's Petition for Rehearing with Suggestion for Rehearing in Banc was denied September 17, 1996. (App. 20). The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED IN THE CASE

45 U.S.C. sec. 51 et. seq.

> Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce...for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment...

Rule 403 of the Federal Rules of Evidence

> Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On the night of February 19, 1993, the petitioner, Ronald Mandrgoc, an employee of the Patapsco & Back Rivers Railroad Company, was a brakeman in a three man crew which was moving three loaded cars, a locomotive and a slug[1], from the basic oxygen furnace, to the mill of Bethlehem Steel (Sparrows Point, Maryland) when the loaded car on which the petitioner was riding derailed. The cause of the derailment has never been determined.

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[1] A slug is like a locomotive with the cab sheared off. Its purpose is to give additional traction because the cars are so heavy.

The derailment occurred at a switch known as the 229 switch. There had been in the two week period prior to this occurrence, four other derailments within an area of 300 feet of the 229 switch. No records exist which indicate the cause of the other four derailments. None of the workers who were involved in the repairs necessitated by the derailments was able to offer any explanation (nor memory) of any of these events. The respondent's representatives indicated that no one kept any notes regarding these events and that there were no records which would aid in revealing the causes of the derailments.[2]

The three loaded cars contained liquid metal at temperatures of 2,500 degrees. Each car's contents was extremely heavy, hundred of thousands of pounds. The cars which contained the liquid metal were known as Lackawana subs.[3]

The petitioner threw the switch prior to the derailment. He was experienced, having performed this procedure for a period of approximately 17 years. After he threw the switch, he ascertained that the area of the track

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[2] The railroad workers who had made the repairs had been deposed prior to the date of trial.

[3] The reference to sub derives from the shape of the car which in an abstract way resembles a submarine.

which moves in response to the switch being thrown, called the points, was in the proper position and that the latch was properly secured. After he got back onto the Lackawana sub which was being pushed by the engine and slug, the lead car (a loaded Lackawana sub) on which he was standing derailed, causing him to sustain an injury. The petitioner felt that in performing his duties everything was done properly, and he did nothing to cause or contribute to the occurrence. Furthermore, the respondent admitted that it was in control of this particular railroad track and that the duty to maintain the track was a non-delegable duty.

II. PROCEDURAL SUMMARY

Petitioner, Ronald C. Mandrgoc, brought this action pursuant to the Federal Employers' Liability Act, Title 45 U.S.C. §51 et. seq. alleging that on or about February 19, 1993, he was injured in the course of his employment with Respondent, Patapsco & Back Rivers Railroad Company, as a result of the respondent's negligence.

The case was called for a jury trial on November 20, 1995 before District Court Judge Andre Davis, sitting in the United States District Court for the District of Maryland. A jury trial had been prayed, but while waiting for the jury, the Court proceeded with arguments

on a Motion in Limine which had been filed by the respondent.

The Motion in Limine sought to prevent introduction of evidence and references to, among other things, evidence that there had been four derailments within the two week period prior to the derailment of February 19, 1993, which the petitioner contends caused him to sustain injuries. The Court granted the respondent's Motion in Limine.

Thereafter, a colloquy ensued regarding the petitioner's theory of negligence.

Petitioner advised the Court that as a result of the Court's rulings on the Motion in Limine, the petitioner would be relying on *Res Ipsa Loquitur* and specifically, while not exclusively, the case of Jesionowski Administratrix v. Boston & Maine Railroad, 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 416 (1946). (Petitioner did not waive his reliance on a theory of negligence based on the four prior derailments).

The Court responded that it was not prepared to rule on the issue of whether a derailment in and of itself was sufficient in an FELA case to raise a jury question under the doctrine of *Res Ipsa Loquitur;* however, the Court's reluctance to submit such a case to a jury was evident.

The Court had sent a strong message to Petitioner and discussion among the

Court and counsel for Petitioner and Respondent ensued regarding the practicality of observing the following procedure suggested by the Rule 50 annotations of the 1991 Amendment contained in Federal Civil Judicial Procedure and Rules, 1995 Edition, Rule 50 at p. 181:

> The revision authorizes the court to perform its duty to enter judgment as a matter of law at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party's case. Thus, the second sentence of paragraph (a)(1) authorizes the court to consider a motion for judgment as a matter of law as soon as a party has completed a presentation on a fact essential to that party's case. Such early action is appropriate when economy and expedition will be served. In no event, however, should the court enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact. In order

> further to facilitate the exercise of the authority provided by this rule, Rule 16 is also revised (not revised as of date of this commentary) to encourage the court to schedule an order of trial that proceeds first with a presentation on an issue that is likely to be dispositive, if such an issue is identified in the course of pretrial.

Since the complete trial may have lasted at least five trial days, the Court and counsel agreed that in light of the fact that all of the evidence had already been presented to the Court, it would be appropriate to proceed by way of a proffer of evidence and Respondent's Motion for Judgment under Rule 50. The proffer was made. Respondent moved for judgment as a matter of law, and the Court granted Respondent's Motion.

On appeal, the Fourth Circuit found that Mandrgoc was unable to fulfill the elements for submitting his case to a jury under the doctrine of *res ipsa loquitur* and the District Court did not abuse its discretion in excluding evidence of prior accidents.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's opinion regarding the application of *res ipsa loquitur* in FELA cases is in conflict with the United States Supreme Court and other courts of appeal.

The Fourth Circuit's opinion rejected Petitioner Mandrgoc's proposed application of the doctrine of *res ipsa loquitur*. The Fourth Circuit concluded in the FELA case that "a derailment can occur in the absence of negligence and a party other than the railroad - Mandrgoc himself was substantially in control of the instrumentalities that played a role in the inquiry." Mandrgoc v. Patapsco & Back Rivers Railroad Co., No. 95-3123 at p. 6 unpublished, per curium opinion (App. 9). The Fourth Circuit's holding was the same as in Jesionowski Administratrix v. Boston & Maine Railroad Company, 154 F.2d 703 (1946) by the United States Court of Appeals for the First Circuit. In that case the court stated that "the thing which caused the injury in our case was within the confines of a compound of several elements... In a very practical sense (Jesionowski) and not the corporation was

in control of (the) important elements." supra at 704-705.[4]

The reasoning for the decisions in both cases was the same; however, this analysis was expressly rejected by the United States Supreme Court in Jesionowski, 329 U.S. at 456, 457, 67 S.Ct. 401, 91 L.Ed. 416 (1947) as being unduly restrictive of the jury's right to draw inferences from evidence. Jesionowski, supra, at p. 45. The Supreme Court held that even though the railroad did not have exclusive control over all factors because Jesionowski had immediate control over the switching mechanism, those non exclusive controlled factors were not proven to be connected to the cause of the derailment and thus would not bar the application of the *res ipsa loquitur* doctrine.

The facts in the case at bar are virtually identical to the facts in Jesionowski. Both Mandrgoc and Jesionowski were performing the same duties as brakemen and had immediate control over the process of switching the cars. In both cases, there was no evidence that this switching of the cars was completed improperly and yet each

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[4] The Fourth Circuit is reported to be one of the only Circuits which has not adopted the applicability of the doctrine of *res ipsa loquitur* to FELA cases. *See 4 L.Sand, et al. Modern Federal Jury Instructions, Instruction 89-20, Res Ipsa Loquitur authority and comment.*

train derailed for an apparently unknown reason.

In the present case, a jury could have come to the same conclusion as in Jesionowski; however, the Fourth Circuit in its opinion while recognizing the need to "view the evidence in a light most favorable to Mandrgoc and draw all reasonable inferences in his favor". (Mandrgoc, supra, at p. 5) (App. 9). does just the opposite and places an unwarranted burden on the Plaintiff by stating that "Mandrgoc cannot point to 'facts of the occurrence [that] warrant the inference of negligence' on the Railroad's part." (Mandrgoc, supra, at p. 7). (App. 7).

This quoted portion of the opinion crystallizes the flaw in the Fourth Circuit's reasoning. If the facts of the occurrence raised an inference of negligence, there would be no need to rely on *res ipsa loquitur* because facts which raise an inference of negligence are direct evidence of negligence.[5] The very purpose of the doctrine of *res ipsa loquitur* is to benefit an injured person where the true facts of the occurrence are accessible to the defendant, but not

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[5] This court's opinion also cites the lack of expert witness testimony as to "any inadequacy in the Railroad's operation." (App. 12). If such evidence were offered, there would be no need for reliance on res ipsa loquitur

the injured party. Furthermore, since the stipulated evidence revealed that an investigation by the railroad could find no cause for the occurrence, it followed that there was no evidence of negligence found on the part of Mandrgoc. (Is that not a reasonable inference if the evidence is viewed in a light most favorable to Mandrgoc?)[6]

And finally, the flaw in the quote from p. 7 is most telling when weighed against Justice Black's statement in Jesionowski, supra, at p. 458:

> "Derailments are extraordinary, not usual, happenings. When they do occur, a jury may fairly find that they occurred as a result of negligence. It is true that the jury might have found here that this accident happened as a result of the negligence of the deceased; but although the respondent offered evidence to establish this fact, it 'did not satisfy the jury.' Southern Ry v. Bennett, supra, at 86. With the deceased freed from any negligent conduct in connection with the switch or the signaling, we have left an

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[6] Also as part of the stipulation, it was agreed that Mandrgoc would testify that he did nothing to cause the derailment.

accident, ordinarily the result of negligence, which may be attributed only to the lack of care of the railroad, the only other agency involved. Once a jury, having been appropriately instructed, finds that the employee's activities did not cause the derailment, the defendant remains as the exclusive controller of all the factors which may have caused the accident. It would run counter to common everyday experience to say that, after a finding by the jury that the throwing of the switch and the signaling did not contribute to the derailment, the jury was without authority to infer that either the negligent operation of the train or the negligent maintenance of the instrumentalities other than the switch was the cause of the derailment. It was uncontroverted that the railroad has exclusive control of both. We think that the facts support the jury's findings both that the deceased's conduct did not cause the accident and that the railroad's negligence did."

The similarity of the facts in both cases is patent. The Supreme Court standard applied to the Mandrgoc facts would lead to the opposite result of that handed down by the Fourth Circuit in its unpublished per curium opinion.

Mandrgoc did exercise significant personal control over the activities involved in that he operated the switch himself and was responsible for seeing that it was latched properly. The Fourth Circuit concluded that because the switching mechanism was in good condition and Mandrgoc himself had immediate control of the switch, the factors leading to the derailment were not in the exclusive control of the railroad. The Fourth Circuit seems to suggest that Mandrgoc may have been contributorily negligent in this case; however, not only is the suggestion unsupported by any facts stipulated to by the parties but also is irrelevant as the facts viewed in a light most favorable to Mandrgoc clearly raise a jury question. (see footnote 6, supra). An internal investigation by the railroad turned up no evidence that Mandrgoc did anything improper (the burden of proving contributory negligence being on the railroad). Furthermore, prior to this incident, within a two week period there were four other derailments within 300 feet of this occurrence which occurred when Mandrgoc was not present (evidence of which was improperly excluded).

The absence of evidence of Mandrgoc's negligence parallels the facts in Jesionowski, 329 U.S. at 456, 457 where the plaintiff also had control over switching and signaling which may have been a probable causative factor in the accident; however, the Supreme Court held that if a jury could reasonably infer that Jesionowski's actions were not the cause of the accident they could then fairly decide that the defendant, Boston & Maine Railroad's, actions must be the cause. The Supreme Court was careful to state that just because the injured person participates in some way in the operations of the railroad that does not defeat the requirement of exclusive control on the part of the railroad.

A party can use the *res ipsa loquitur* doctrine without having to compel the inference of negligence. All that is required is evidence sufficient to warrant an inference of negligence. Sweeney v. Erving, 288 U.S. 233, 240 (1913). The evidence that a derailment occurred as stipulated by the parties was enough to warrant an inference of negligence in this case since under the Jesionowski ruling, the mere fact that a derailment occurred is enough to invoke the *res ipsa loquitur* doctrine in an FELA case.

The Supreme Court in Jesionowski Administratrix v. Boston & Maine Railroad Company, 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 416 (1947) stated explicitly that

"derailments are extraordinary not usual happenings" and "when they do occur a jury could fairly find that they occurred as a result of negligence." Giving this statement its ordinary meaning, evidence that a derailment occurred is sufficient in an FELA case for a jury to infer negligence on the part of a railroad.

The Supreme Court at no place in Jesionowski, supra, states that some derailments are extraordinary while others are not. It delineates neither quantitative nor qualitative requirements necessary for a derailment to be an extraordinary event. It merely says "derailments are extraordinary, not usual happenings." The Fourth Circuit reads into Jesionowski a requirement that does not appear in the Supreme Court opinion.

Also, the Fourth Circuit pointed out that the record contained no hint of negligence comparable to the evidence of a defective frog (App. 13). Once again, if Mandrgoc had such evidence he could have proceeded on a theory of negligence. Reference to the frog in Jesionowski is nothing more than a red herring since in Jesionowski there was not even a hint that the frog was faulty. The Circuit Court of Appeals for the First Circuit in Jesionowski, supra, at p. 704 stated:

> "There is evidence to the effect that the road bed rails, switch and switch mechanism,

> and the frog were found in good condition, and the same is true as to the several parts of the cars involved, except only the damaged parts due to the wreck. No counter evidence is in the case." (emphasis added)

Res Ipsa Loquitur is not and should not be a strict judicial formula that would force the petitioner to provide proof of the railroad's negligence before proceeding under such a theory. See, Sweeney, 228 U.S. 233 (1913).

The United States Court of Appeals for the Second Circuit addressed the *res ipsa loquitur* issue in Ruddy v. New York Central Railroad Company, 224 F.2d 96 (1955). There, the court held under the *res ipsa loquitur* doctrine an inference of negligence can be made merely by the fact that a derailment occurred when the train passed over a curve. Id. at 98. The judges stated that even if they personally would have difficulty holding that evidence of a derailment alone was enough to infer negligence, it was well established by Jesionowski v. Boston & Maine Railroad Company, 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 416 (1947) that the jury could so infer.

In Chicago & N.W. Ry. Co. v. Green, 164 F.2d 55 (1947), the United States Court of Appeals for the Eighth Circuit interpreted the Supreme Court's ruling in Jesionowski. The Eighth Circuit followed

Jesionowski in stating that since derailments are not usual occurrences, a jury could find that they occur because of the negligence of the railroad. The Eighth Circuit required only evidence that a derailment occurred to allow the plaintiff to proceed under a *res ipsa loquitur* doctrine.

In view of the opinions of the Supreme Court and other courts of appeals, the Fourth Circuit required evidence inconsistent with the application of the doctrine of *res ipsa loquitur* in FELA cases. In fact, the Fourth Circuit's opinion goes beyond the traditional view of courts in requiring proof of specific facts of negligence or expert testimony before allowing application of the doctrine. In fact, no case is known in any jurisdiction which has required such a rigid standard of proof. To permit such an interpretation would defeat the very doctrine itself; and while the Court announced that the opinion was not binding precedent in the Fourth Circuit, it did grave injustice to an injured railroad employee who should have been given "a light burden of proof on negligence and causation." Estate of Larkins v. Farrell Lines, Inc., 806 F.2d 510, 512 (Fourth Cir. 1986) cert. denied, 481 U.S. 1037 (1987). The opinion not only failed to observe the "light burden," but created a burden that surpassed even that required under common law.

The standard created by the court failed to observe Justice Brennan's statement in Rogers v. Missouri Pacific R.Co., 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) at p. 509:

> "The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that make it significantly different from this ordinary common-law negligence action has required this court to review a number of cases. In a relatively large percentage of the cases reviewed, the Court has found that lower courts have not given proper scope to this integral part of the congressional scheme. We reach the same conclusion in this case. The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury. Special and important reasons for the grant of certiorari in

these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination." (numerous footnotes omitted)

II. The Fourth Circuit opinion regarding the probative value of four prior derailments occurring within a two week period in an area of 300 ft. of this occurrence failed to interpret Rule 403 of the Federal Rules of Evidence consistent with other courts of appeals.

The FELA mandates that an employer provide an employee a safe place in which to work and its failure to do so constitutes negligence. Duncan v. St. Louis - San Francisco Ry. Co., 480 F.2d 79 (8th Cir. 1973), certiorari denied, 414 U.S. 859, 94 S.Ct. 69, 38 L.Ed. 1091 (173). This non-delegable duty exists even when an employee is required to go onto the property owned by a third party, and includes the employer's responsibility to inspect the premises where its employees will be working and to take reasonable precautions to protect its employees from possible danger. Cazad v. Chesapeake and Ohio Ry. Co., 622 F.2d 72 (4th Cir. 1980).

In an effort to show that the defendant had breached this duty (and to show an absence of contributory

negligence), Petitioner intended to produce evidence that within a two week period four other derailments had occurred within 300 feet of the spot where the derailment occurred in the present case. Furthermore, no one knew why any of the five derailments occurred, and the employer kept no notes or records with regard to the cause of the derailments.

The Court granted the Motion in Limine barring evidence of the prior derailments because the Court was not satisfied that under Rule 403, the probative value of the evidence of the prior derailments outweighed "the likelihood of unfairness, confusion of the issues and delay that will be occasioned." However, the evidence was relevant to show a breach of duty by the respondent and/or a lack of contributory negligence on the part of the petitioner, even though the derailments did not occur at precisely the same point in the track.

In Cereste v. New York Haven and Hartford Railroad Co., 231 F.2d 50 (2nd Cir. 1956), an employee of the railroad tripped over a lump of coal on a path between tracks. The appellate court found no error in the admission of evidence of coal falling in other parts of the yard and at other times, and expressed the following view:

> The Supreme Court has construed FELA in a manner most generous

> to employees, presumably on the theory that the statute expresses a policy of unusually high regard for their protection. Absent any Supreme Court decision under FELA excluding evidence of a habit of negligence, we think we should accept the more rational view; and we therefore hold that the trial judge did not "abuse" his discretion on receiving this evidence. (citations omitted).

In the case of Henwood v. Chaney, 156 F.2d 392 (8th Cir. 1946), cert. denied, 329 U.S. 760, 67 S.Ct. 113, 91 L.Ed. 655 (1946), Plaintiff, a switchman for Defendant, brought an action against the Trustee of the defendant railroad under the Federal Employers' Liability Act for injuries sustained when defendant failed to furnish a reasonably safe place in which to work. The issue was whether the defendant had negligently permitted oil and mud to accumulate which caused the plaintiff to fall. The defendant assigned as error the District Court's admitting evidence of four witnesses that they slipped and fell in the railroad yard near the point where the plaintiff's accident occurred. The Court discussed the admissibility of such evidence at p. 397 of the opinion as follows:

"Evidence of prior or subsequent similar accidents at or near the same place are admissible if they are not too remote in time, in order to show dangerous character of the place and defendant's knowledge thereof. District of Columbia v. Arms, 107 U.S. 519, 2 S.Ct. 840, 327 L.Ed. 618; Evans v. Erie R. Co., 6th Cir. 213 F.129; Chicago & N.W.R. Co. v. Netolicky, 8 Cir. 67 F. 665; Benner v. Terminal R.R. Ass'n of St. Louis, 348 Mo. 9218, 156 S.W. 2d 657, certiorari denied 315 U.S. 813, 62 S.Ct. 798, 86 L.Ed. 1211; 230 Am. Jur. 282, Sec. 304. As stated in Lever Bros. Co. v. Atlas Assur. Co. Ltd., et al., 7 Cr., 131 F.2d 770, at page 777: 'There are no hard or fast rules as to what degree of similarity there must be to make the evidence admissible. If there is no similarity of conditions, then the evidence would be inadmissible. If there is some similarity of conditions, the weight of that evidence would be in proportion to the evidence of similarity, the greater weight to be given where the similarity is less.' We deem the circumstances

> surrounding the accident sustained by these switchmen sufficiently similar to that sustained by plaintiff to render the testimony admissible. They attributed their falls to the same conditions encountered by plaintiff and their falls occurred in the same general location, though not at the exact spot of plaintiff's injury. But the differences in detail could be brought out on cross examination and did not require exclusion of the evidence."

In Cahill v. The New York, New Haven and Hartford Railroad Company, 351 U.S. 183, 76 St.Ct. 758, 100 L.Ed. 1075 (1956) the Supreme Court remanded the case to the United States Court of Appeals for further proceedings on the admissibility of evidence of prior accidents. In a per curium opinion the Court discussed the issues, thusly:

> "The prior accidents, nine in number, were listed in defendant's answer to plaintiff's 27th interrogatory. Each accident was described merely as a collision between a train and a motor vehicle at substantially the same place

where plaintiff was injured, i.e., near the intersection of Forbes Avenue and Waterfront Avenue. The collision occurred during a period from January 4, 1946 to February 9, 1953. In none of them does it appear that any railroad employee or other person sustained injuries. The defendant argues that since these collisions were not shown to have been caused in a manner similar to the plaintiff's accident they were not relevant. The list of them was admitted for the sole purpose of supporting the plaintiff's claim that the Railroad knew or reasonably ought to have known that the particular location was unsafe place to put him to work because of his inexperience and the claimed inadequacy of instructions given him as to his duties. For this limited purpose we think the list of prior accidents was admissible. District of Columbia v. Arms, 107 U.S. 519, 524, 2 S.Ct. 840, 27 L.Ed. 6181; cited with approval in Mr. Justice Black's dissenting opinion in the instant case, 351 U.S. 183, 189-190, 76 S.Ct. 158; Plough v. Baltimore & O.R. Co., 2

> Cir., 164 F.2d 254, 256, certiorari denied 333 U.S. 861, 68 S.Ct. 740, 92 L.Ed. 1140; Baltimore & O.R. Co. v. Felgenhauer, 8 Cir. 168 F.2d 12, 17. In any event, admission of the evidence, if assumed to be erroneous, was not so prejudicial as to justify reversal, for Palmer and Horan, employees long in defendant's service, had testified without objection that collisions between a train and vehicular traffic on Forbes Avenue had occurred from time to time, and Horan had expressly stated that flagmen had been killed out there."

In the case of District of Columbia v. Arms, 107 U.S. 519, 524, 2 S. Ct. 840, 845 (1883) defendant complained of the admission of evidence of as many as five persons having fallen at the spot where plaintiff alleged he had fallen and sustained injury. In rejecting appellant's argument that admission of such evidence was error in that "it tended to introduce collateral issues and thus mislead the jury from the matter in controversy."

The court opined:

> "Were such the case the objection would be tenable, but

no dispute was made as to these accidents, no question was raised as to the extent of the injuries received, no point was made upon them, no recovery was sought by reason of them, nor any increase of damages. They were proved simply as circumstances which, with other evidence, tended to show the dangerous character of the sidewalks in its unguarded condition. The frequency of accidents at a particular place would seem to be good evidence of its dangerous character at least, it is some evidence to that effect. Persons are not wont to seek such places, and do not willingly fall into them. Here the character of the place was one of the subjects of inquiry to which attention was called by the nature of the action and the pleadings, and the defendant should have been prepared to show its real character in the fact of any proof bearing on that subject.

Besides this, as publicity was necessarily given to the accidents, they also tended to show that the dangerous character of the locality was

brought to the attention of the city authorities."

CONCLUSION

In view of the foregoing, Ronald C. Mandrgoc, respectfully requests this Court to grant the Petitioner's Writ of Certiorari.

Respectfully submitted, this 13th day of December, 1996.

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No. _____

In The
Supreme Court of the United States

October Term 1996

RONALD MANDRGOC,

Petitioner,

v.

PATAPSCO & BACK RIVERS RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Petition

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-3123

RONALD C. MANDRGOC,
Plaintiff-Appellant,

v.

PATAPSCO & BACK RIVERS
RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Andre M. Davis, District Judge.

(CA-94-3287-AMD)

Argued: July 9, 1996
Decided: August 23, 1996
Entered: August 23, 1996

Before WILKINS, HAMILTON, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Allan B. Rabineau, RABINEAU & PEREGOFF, Baltimore, Maryland, for Appellant. Robert T. Franklin, SEMMES, BOWEN & SEMMES, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

WILLIAMS, Circuit Judge:

Ronald C. Mandrgoc appeals from the district court's entry of judgment as a matter of law, see Federal Rules of Civil Procedure 50(a), in favor of Patapsco & Back Rivers Railroad Co. (the Railroad) on his negligence claim under the Federal Employers' Liability Act (FELA), 45 U.S.C.A. §§ 51-60 (West 1986). A seventeen-year employee of the Railroad, Mandrgoc sued to recover damages for a foot injury he sustained when he leapt from the platform of a slow-moving railroad car moments before it inexplicably derailed. The district court granted the Railroad's motion in limine to exclude evidence of four prior unexplained derailments. Finding that Mandrgoc proffered no other evidence of negligence and rejecting his request to

proceed under the doctrine of res ipsa loquitur, the district court then granted judgment as a matter of law for the Railroad. Mandrgoc appeals the district court's evidentiary ruling and its refusal to submit the case to the jury. Finding no error, we affirm.

I.

The following facts are not in dispute.[1] As a brakeman (also known as a groundman), Mandrgoc signaled an engineer to move the train through a thrown switch, thereby permitting the train to change tracks. On the night he was injured, Mandrgoc was a member of a three-man crew that was moving railroad cars into and out of the mills of a steel plant in Sparrows Point, Maryland. The crew successfully had moved cars through three switches on track 229 several times during their shift. Immediately before the partial derailment occurred, Mandrgoc threw the "229 switch," latched it, and inspected the switch, track, terrain, and the three cars to be moved through the switch. He then boarded a platform on the lead car and signaled the engineer to

---

[1] During the pretrial hearing which concluded with the district court's entry of judgment as a matter of law for the Railroad under Fed. R. Civ. P. 50(a), the parties either stipulated to the facts or forecast the presentation of uncontroverted evidence in support of these facts.

move the locomotive, slug,[2] and cars, which were loaded with hundreds of thousands of pounds of liquid steel, through the switch. As the engineer moved the cars very slowly through the switch, Mandrgoc sensed a problem with the lead car and jumped to the ground, injuring himself.[3] Without any apparent cause, the lead car then partially derailed. A subsequent inspection of the derailed car revealed no defects, and the cause of the derailment remains unknown.

The Railroad had experienced four prior unexplained derailments on the same stretch of track, the last of which had occurred nine days before the instant derailment. Although they did not record the exact location of the prior derailments, the Railroad's repair records indicated that at least two of them did not involve any of the switches on track 229. During the nine-day period between the fourth derailment and the derailment here, the Railroad estimated that more than 2,000 cars had passed through the 229 switch without incident.

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[2] A slug "is like a locomotive with the cab sheared off. It's to give additional traction because the cars are so heavy." (J.A. at 53.)

[3] Although Mandrgoc's leap from the car, rather than the partial derailment, was the immediate cause of his injury, we shall assume for purposes of this appeal that Mandrgoc nevertheless would be able to prove the causation element of his negligence claim at trial.

Asserting that the Railroad's negligence caused his injuries, Mandrgoc filed this FELA action in the United States District Court for the District of Maryland. Shortly before a jury was to be impaneled, the district court granted both the Railroad's motion in limine to exclude the evidence concerning the prior derailments, and, upon the parties' stipulation of the evidence to be presented at trial, its motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure. Mandrgoc appeals both the evidentiary ruling and the entry of judgment as a matter of law for the Railroad.

II.

Lacking direct evidence of negligence, Mandrgoc first asserts that a rational jury could infer that the Railroad was negligent from evidence that four prior derailments occurred within 300 feet of the partial derailment that allegedly caused his injuries. He claims that the evidence was admissible under the Federal Rules of Evidence to show a habit of negligence, a breach of the standard of care, or the absence of contributory negligence.

The district court, however, found that an inference of negligence on the basis of prior derailments would be impermissible because there was no

evidence that they occurred at the 229 switch or that they resulted from the Railroad's negligence. The court therefore excluded the evidence, concluding that the dangers of unfair prejudice, confusion, and delay substantially outweighed its probative value under Rule 403 of the Federal Rules of Evidence.

Reviewing the district court's evidentiary ruling for an abuse of discretion, see Stillman v. Norfolk & Western Ry., 811 F.2d 834, 838 (4th Cir. 1987), we affirm. The prior derailments are irrelevant to Mandrgoc's case because their occurrence does not tend to make the Railroad's negligence in connection with the instant derailment any more or less probable. See Fed. R. Evid. 401. While a prior derailment could be probative of the Railroad's negligence if it occurred "under substantially the same conditions, at substantially the same place" and "at a time not too remote therefrom," see Sears, Roebuck & Co. v. Copeland, 110 F.2d 947, 948-49 (4th Cir. 1940), Mandrgoc cannot make such a connection here. He cannot show, for example, that any prior derailment occurred at the 229 switch or under similar circumstances. Additionally, Mandrgoc agreed that the prior derailments took place without any apparent negligence on the Railroad's part. Moreover, he acknowledges that thousands of railroad cars passed through

the 229 switch uneventfully in the nine days prior to the partial derailment at issue here and that sometimes, in railroading, a derailment simply cannot be explained. The prior derailments thus shed no light on the question of whether the Railroad failed in its duty to maintain a safe workplace for Mandrgoc and therefore are irrelevant.

In addition, to conclude that the Railroad was negligent on the basis of this evidence a jury first would have to determine that the first four derailments resulted from the Railroad's negligence, a diversion from the merits of the case that the district court properly sought to avert under Rule 403. We therefore affirm the exclusion of this evidence.

III.

Alternatively, Mandrgoc proposes to advance his claim under the doctrine of res ipsa loquitur. Under this doctrine, he contends, a jury could infer from the occurrence of the partial derailment itself that the Railroad was negligent. In Mandrgoc's view, the Railroad exercised exclusive control over the switch, track, terrain, and cars, and it possessed superior knowledge regarding the operation, repair, and maintenance of these instrumentalities. Given this exclusive control, he argues the Railroad is presumptively liable and bears the burden of producing an explanation for

the derailment. The Railroad, on the other hand, contends that the doctrine of res ipsa loquitur does not apply in this case because derailments can occur in the absence of negligence, Mandrgoc exercised a substantial degree of control over the instrumentalities that caused his injury, and he may have been negligent in performing his duties or in leaping from the car.

The district court held that the circumstances surrounding the partial derailment did not warrant a jury instruction on the doctrine of res ipsa loquitur. Rejecting Mandrgoc's suggestion, the district court refused to apply a blanket rule that the res ipsa loquitur doctrine governs all derailment cases. Concluding that the unexplained derailment standing alone is an insufficient basis under the FELA for a jury verdict in Mandrgoc's favor, the district court entered judgment for the Railroad.[4]

We review de novo a district court's denial or grant of judgment as a matter of law, see Trandes Corp. v. Guy Atkinson Co., 996 F.2d 655, 661 (4th Cir.), cert.

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[4] The district court's pre-trial res ipsa loquitur ruling was dispositive of the case because of the unexplained nature of the derailment. Mandrgoc acknowledged that he could present no other evidence of negligence. Without the benefit of an inference of negligence under the res ipsa loquitur doctrine, Mandrgoc had no case to present to the jury.

denied, 114 S. Ct. 443 (1993), and we like-wise conduct a plenary examination of a res ipsa loquitur ruling, see Stillman, 811 F.2d at 836. In so doing, we must view the evidence in a light most favorable to Mandrgoc and draw all reasonable inferences in his favor. See Tools USA & Equip. Co. v. Champ Frame Straightening Equip., Inc., ___ F.3d #6D 6D6D#, 1996 WL 364747, at *1 (4th Cir. July 2, 1996). The question we must ask is whether "`the only conclusion a reasonable trier of fact could draw from the evidence is in favor'" of the Railroad. Id. (quoting Winant v. Bostic, 5 F.3d 767, 774 (4th Cir. 1993)). We answer that question affirmatively. Because a derailment can occur in the absence of negligence, and a party other than the Railroad -- Mandrgoc himself -- was substantially in control of the instrumentalities that played a role in the injury, we affirm the district court's decisions not to apply res ipsa loquitur in this case and to enter judgment for the Railroad.

Under the FELA, a railroad owes a duty to maintain a reasonably safe workplace for its employees. See Peyton v. St. Louis Southwestern Ry. Co., 962 F.2d 832, 833 (8th Cir. 1992). A breach of that duty results in liability for damages "for such injury or death resulting in whole or in part from the [railroad's] negligence." 45 U.S.C.A. § 51 (West 1986). A remedial statute, the

FELA creates a "light burden of proof on negligence and causation," Estate of Larkins v. Farrell Lines, Inc., 806 F.2d 510, 512 (4th Cir. 1986), cert. denied, 481 U.S. 1037 (1987), which an employee can meet if "employer negligence played any part, even the slightest, in producing the injury," Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506 (1957). The FELA, however, is not a workers' compensation scheme under which an employee may recover for injuries regardless of fault. See Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396, 2404 (1994). Although liberally construed, the FELA imposes on an employee seeking damages "the burden of proving some act of negligence by the railroad." Hurley v. Patapsco & Back Rivers R.R., 888 F.2d 327, 329 (4th Cir. 1989) (per curiam).

In an appropriate FELA case, an employee may rely on the doctrine of res ipsa loquitur to meet this light burden of proof. See Stillman, 811 F.2d at 836. To obtain the benefit of an inference of negligence under the doctrine, the employee must satisfy three elements:

> (1) the injury for which the [employee] seeks recovery must be of a kind that ordinarily does not occur in the absence of negligence; (2) the injury must have been caused by some agency or instrumentality

> within the exclusive control of the [Railroad]; and (3) the injury must not have been due to any contribution or voluntary activity on the part of the [employee].

Id. at 836-37. Thus, although the "mere happening of an accident" will not warrant a res ipsa loquitur instruction, see Estate of Larkins, 806 F.2d at 512, the doctrine is appropriate if the circumstances surrounding an unexplained accident would permit a reasonable jury to infer that the Railroad was negligent, see Jesionowski v. Boston & M.R.R., 329 U.S. 452, 457-58 (1947).

In Jesionowski, for example, the administratrix of a railroad employee's estate was entitled to a res ipsa instruction because she adduced evidence that a train derailment would not have occurred in the absence of negligence on the Railroad's part. Id. at 458. Jesionowski's estate elicited testimony that a "frog operated with a spring mechanism," which was located about seventy-five feet from the switch, may have caused the derailment. Id. at 455. Once the jury found that the deceased employee's throwing of the switch and signaling to the engineer did not contribute to the derailment that killed him, the jury was free to infer from the circumstances surrounding the derailment that the Railroad was negligent. Id. at

458. Because these facts warranted the res ipsa loquitur instruction that the trial court delivered in Jesionowski, the Supreme Court reinstated a jury verdict for Jesionowski. Id.

In contrast, Mandrgoc cannot point to "facts of the occurrence [that] warrant the inference of negligence" on the Railroad's part. Id. at 457 (quoting Sweeney v. Erving, 228 U.S. 233, 240 (1913)). First, he failed to show this derailment ordinarily would not have occurred in the absence of negligence. While the derailment in Jesionowski may have been of an "extraordinary" sort, there is no evidence in the record from which we can draw that conclusion here. Moreover, Mandrgoc proffered no expert witnesses regarding any inadequacy in the Railroad's operation, repair, or maintenance of the 229 switch. See Hurley, 888 F.2d at 329 (noting that railroad employee failed to produce expert testimony or other evidence to support his claim that the railroad maintained inadequate lighting for the safe operation of a lathe). He also failed to show how the Railroad could have foreseen or prevented the accident. See Peyton, 962 F.2d at 834 (finding that railroad employee could not prove that railroad" could have discovered the defect in the crow's foot," a tool that "fractured unexpectedly" and injured the employee). Indeed, thousands of cars safely had passed through the 229 switch

in the weeks before the partial derailment that allegedly injured Mandrgoc, including at least two trains immediately before. While an employee is not required to show affirmative proof of negligence to invoke the res ipsa loquitur doctrine, at a minimum he must show that the specific circumstances surrounding the unexplained accident show that it was likely the result of negligence. See Jesionowski, 329 U.S. at 457. Here, however, the record contains no hint of negligence comparable to the evidence of a defective frog and spring in Jesionowski.

Second, Mandrgoc has not demonstrated that the Railroad alone controlled the switch and cars involved in the incident. As the brakeman on the crew, Mandrgoc was responsible for throwing the switch, verifying that it was latched properly, and signaling the engineer to proceed. Before the district court, the parties stipulated that Mandrgoc would testify that the switch looked safe to him when he gave the signal. Moreover, Mandrgoc elected to jump from the car in anticipation of the derailment. Thus, Mandrgoc personally exerted partial control over the instrumentalities that caused his injury. See Santa Maria v. Metro-North Commuter R.R., 81 F.3d 265, 272 (2d Cir. 1996) (holding res ipsa loquitur instruction was inappropriate because employee had partial control over a cot, supplied by

the Railroad, which collapsed while employee was sleeping on it); Stillman, 811 F.2d at 837 (holding the railroad did not have exclusive control over the forklift whose blades fell onto the employee because the employee had placed himself under the blades). Although an employee's participation in the accident that caused his injuries does not per se bar the application of res ipsa loquitur, see Jesionowski, 329 U.S. at 457, Mandrgoc's significant role in the events leading to his injury demonstrates that the Railroad did not exclusively control the instrumentalities.

Thus, Mandrgoc is unable to fulfill two elements for submitting his case to a jury under the doctrine of res ipsa loquitur. Because he could present no other evidence of negligence, a jury "could have reached a verdict in [Mandrgoc's] favor only by speculating" as to the cause of this accident. Hurley, 888 F.2d at 329. Even in view of his light burden of showing that the Railroad's negligence played a slight part in his injury, we agree with the district court that Mandrgoc's case is insufficient as a matter of law.

IV.

Because Mandrgoc could not show a sufficient similarity between the four prior derailments and the one that allegedly caused his injuries, the

district court did not abuse its discretion in excluding the evidence of prior accidents. Moreover, the district court correctly entered judgment as a matter of law for the railroad because Mandrgoc failed either to satisfy the prerequisites of a res ipsa loquitur instruction or to forecast other evidence of negligence. Accordingly, we affirm.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. AMD-94-3287

RONALD C. MANDRGOC,
Plaintiff,

v.

PATAPSCO & BACK RIVERS RAILROAD COMPANY,
Defendant.

Entered: November 20, 1995

JUDGMENT

This matter came before the Court for a trial by jury, and counsel having been heard, and Counsel having made evidentiary proffers and having entered into certain stipulations, and upon the oral motion of defendant for judgment as a matter of law, and the Court having rendered an oral opinion, it is this 20th day of November, 1995, for reasons stated in open court, ORDERED:

1. That defendant's Motion in Limine is GRANTED, in part,

2. That judgment BE, and the same hereby is GRANTED in favor of defendant against plaintiff pursuant to Rule 50, Federal Rules of Civil Procedure, and

3. Any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by

reference herein and this Order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. P. 58.

FOR THE COURT,
/s/ U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. AMD-94-3287

RONALD C. MANDRGOC,
Plaintiff,

v.

PATAPSCO & BACK RIVERS RAILROAD COMPANY,
Defendant.

Entered: November 20, 1995

ORDER

Having considered the foregoing Motion for Order In Limine, it is this 20th day of November, 1995, by the United States District Court for the District of Maryland ORDERED that the relief prayed for in said Motion be granted and is hereby granted and that Plaintiff and his counsel are hereby instructed not to state, discuss, mention, or bring in any way to the jury's attention, directly or indirectly, at any stage of the case, without obtaining the prior permission of the Court outside the presence and hearing of the jury:

1. Any evidence or argument regarding medical bills or other expenses and alleged economic loss for which the Plaintiff has been reimbursed by the Defendant.

2. Any evidence or argument regarding Plaintiff's ineligibility for workers' compensation benefits.

3. Any evidence or argument concerning "opinions" of Plaintiff or other employees of Defendant with regard to Defendant's equipment, regulations or practices.

4. Any evidence or argument concerning prior occurrences at Defendant's premises involving other areas, railroad cars and employees of the Defendant.

It is further ORDERED that Plaintiff and his attorneys are directed to show and explain this Order to each and every witness called to testify, and to advise each witness that they are bound by said Order.

FOR THE COURT,
/s/ U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-3123
CA-94-3287-AMD

RONALD C. MANDRGOC,

Plaintiff - Appellant,

v.

PATAPSCO & BACK RIVERS RAILROAD COMPANY,

Defendant - Appellee.

Filed: September 17, 1996

ON PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

FOR THE COURT,
/s/ Acting Clerk

No. 96-972

Supreme Court, U.S.
FILED
JAN 17 1997

In The

Supreme Court of the United States

October Term 1996

RONALD C. MANDRGOC,

Petitioner,

v.

PATAPSCO &
BACK RIVERS RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fourth Circuit appropriately affirm the lower court's decision to exercise sound discretion in excluding evidence of prior unrelated derailments?

2. Did the United States Court of Appeals for the Fourth Circuit appropriately affirm the lower court's judgment in favor of the railroad in a Federal Employers' Liability Act ("FELA") case where the plaintiff proffered only the evidence of a partial derailment itself in an attempt to invoke the res ipsa loquitur doctrine?

LIST OF PARENT COMPANIES
AND NONWHOLLY OWNED SUBSIDIARIES

Respondent is a publicly held corporation which is a wholly owned subsidiary of Bethlehem Steel Corporation. The Respondent is not affiliated with any other corporate entity.

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STATEMENT OF THE CASE

Petitioner's Statement of the Case omits critical facts relied upon by the opinions of the courts below. The undisputed facts as set forth here will assist this Court in understanding how the lower courts decided this case. The following undisputed facts of record clearly demonstrate that the courts below correctly applied this Court's precedent with respect to the doctrine of res ipsa loquitur as well as the Federal Rules of Evidence.

Ronald C. Mandrgoc, Petitioner herein, was working for the Patapsco & Back Rivers Railroad Company (hereinafter "Railroad") at the time of the occurrence complained of. The Railroad is an industrial short line railroad which primarily services the steel making operations of the Bethlehem Steel plant in Sparrows Point, Maryland. Such work includes moving railroad cars of raw materials into the mills and taking finished products out to the next stage of the

process. The work is accordingly repetitive and frequently involves the same moves required to keep the plant running. The plant operates twenty-four hours a day, with three shifts.

The crews operating the cars consist of an engineer and at least one "groundman" (i.e. brakeman or conductor). The engineer sits in the locomotive and operates it, but only in response to signals from the groundmen who mount and dismount cars, couple and uncouple cars, throw switches, etc. It is the exclusive duty of a groundman giving the signal to move a train to first inspect the equipment and area to verify that it is safe to make the move in question, before giving such a signal. If there is any question about the safety of the move, work is immediately halted and the move is not made. A yardmaster is then contacted before any further action is taken.

Petitioner had worked for the Railroad as a groundman for approximately seventeen years at the time of the occurrence, and continues to perform such duties to the present. Accordingly, Petitioner was, and is, an experienced groundman well familiar with the applicable safety rules and procedures utilized in the movement of the cars. Throughout his seventeen years working for the Railroad prior to the occurrence, Petitioner had, by his own estimation, thrown hundreds of switches and was well familiar with all of the instrumentalities utilized in the process.

Petitioner has candidly acknowledged the groundman's responsibility to check the equipment and area to verify the safety of a move before signalling the engineer to make it. He has also acknowledged the procedure to follow if the groundman has any question about the safety of the proposed move, in terms of immediately halting work and contacting the yardmaster. Petitioner himself has admittedly utilized that procedure many times over the years.

On February 19, 1993, Petitioner was working as a groundman (brakeman), along with a conductor and engineer, on the B-1 crew. Petitioner had worked this job many times before and was well familiar with its work. The B-1 crew

services the basic oxygen furnace ("BOF"), which includes use of the tracks in the "229" area. The "229" designation refers to an area of several hundred feet of track. There are three switches in the area, one of which is specifically referred to as the "229 switch." The crew had railroaded cars through the 229 switch, where the occurrence took place, several times earlier in the same shift without incident.

The crew needed to go through the 229 switch again to uncouple and set aside several cars it was pulling from the BOF, which were to be moved again later. The crew could then back its loaded cars into the BOF. In accordance with standard procedure, the conductor "dropped off" the train and waited at the BOF for the full ones. He was accordingly not involved in the move in question and did not observe it.

Petitioner uncoupled the empty cars where they were to be temporarily left and then signalled the engineer to move the locomotive and three loaded cars through the 229 switch, at which time he gave a signal for the train to stop. Petitioner was then to throw the 229 switch so that the points would move from the track where the empties were placed to the track to be used to back the loaded cars into the BOF. Petitioner indicated that he fully threw the switch and properly latched it.

Before giving the signal to the engineer to move the loaded cars through the 229 switch which he had just thrown, Petitioner, by his own admission, had the sole responsibility to check the switch, track, and cars, to verify that it was safe to move the cars through the thrown switch. Petitioner testified that he conducted the necessary visual inspection of the instrumentalities involved in the move, and saw absolutely nothing to indicate that there was any reason to question the safety of making the move.

Petitioner's visual inspection specifically included the "points" of the switch. The points of the switch are the short sections of rail which move so as to guide the wheels of the railroad car to one track or the other connected to the switch. It

is important for the groundman to verify that the points are flush against the switch and that there is no gap between the two. If the points are "gapped," then the wheel of a car may go between the points and the rail, while the wheel on the other side is being guided along the rail of the other track, thereby effectively guiding the same car in two different directions simultaneously, which generally results in a derailment. The process of the wheel going between the points and the rail is known as "picking" the switch.

Petitioner alleges that he specifically shined his lantern on the points in question and clearly saw that they were flush against the rail without any gap. He also testified that he visually inspected the tracks and terrain, as well as the cars to be moved, and similarly saw absolutely no problem with them whatsoever. Petitioner has conceded that if he had observed any condition which caused him to question the safety of making the move in question, he would not have signalled the engineer to move but would have stopped and contacted the yardmaster.

Having satisfied himself that it was safe to proceed with the move, Petitioner signalled the engineer to move the cars and climbed the hind car. A "platform" is mounted on the end of the car to provide a safe place to ride on it. Petitioner mounted the steps of the car in question to the platform before giving the signal to move. There is a railing around the platform to hold onto for safety, as the ride on industrial railroad cars is, again by Petitioner's own admission, often a bumpy one. Petitioner had ridden on the platforms of similar cars routinely over his many years as a groundman.

Once he was on the platform, Petitioner signalled the engineer to move. The engineer then moved the throttle of the locomotive, thereby beginning to back the three loaded cars through the 229 switch which Petitioner had just thrown. The cars had just barely begun to move through the switch and were still moving at their intended slow walking pace when Petitioner felt the car he was riding on bumping so as to

indicate to him that it could derail. Petitioner acknowledged that the applicable safety rule and procedure in such a situation is to remain on the platform until the car comes to rest. Petitioner, however, indicated that, at the time, he felt it was more appropriate to leap from the platform to the ground below.

Petitioner leapt from the platform as he signalled the engineer to stop. The car did in fact partially derail, with the back set of wheels coming off of the rails but the other wheels remaining on it. The cars came to a complete stop shortly after Petitioner's signal and jump from his position of safety on the hind car. In the course of jumping from the car, Petitioner sustained injury to his foot.[1]

It was determined that the partial derailment occurred at the 229 switch itself. The subsequent inspection of the car in question, however, revealed no defect or any other condition which would have caused or contributed to such an occurrence. The switch itself and immediately adjacent tracks, of course, were damaged in the course of the partial derailment, and thus inspection of them could offer no indication of why the partial derailment took place. Based upon all of the available evidence, it has never been determined what caused the subject partial derailment to occur. Petitioner, as well as all of the other experienced railroaders who testified in the course of discovery, uniformly agreed that while at times the cause of a derailment can be ascertained, there are other times when there is absolutely no apparent reason or explanation for the derailment. The men all agreed that such unexplained derailments are a part of the ordinary railroading process.

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[1] The partial derailment did not actually cause the injury. Rather, the injury was sustained when Petitioner leapt from his position of safety on the platform to the ground below. The reasonableness of Petitioner's decision in that regard presents a factual issue of negligence and causal relationship, and therefore was not before the Fourth Circuit in conjunction with the appeal, nor is it an issue before this Court.

Petitioner brought this action under the Federal Employers' Liability Act ("FELA"). 45 U.S.C. § 51 (1986). The case was set for a jury trial beginning November 20, 1995 before the Honorable Andre M. Davis, sitting in the United States District Court for the District of Maryland. While waiting for a panel of potential jurors, Judge Davis heard arguments on the Railroad's Motion in Limine and other typical preliminary matters.

The Railroad objected in the Motion in Limine to Petitioner's proffer of evidence of several prior derailments in the 229 area. The last of the prior unrelated derailments occurred more than nine days before the partial derailment here at issue. Thus, based on the undisputed evidence regarding the frequent use of the area, several thousand cars, including the car here at issue, had passed through the subject switch without incident between the most recent previous derailment and the subject partial derailment. In each of the prior unrelated derailments, there were no injuries and no allegations or findings of any negligence on the part of the Railroad.

The Railroad maintains repair records which indicate the location of the repair and the type of repair performed. These records affirmatively indicate that of the four prior derailments in question, two of them definitely did not occur at any of the three switches in the 229 area. For the other two, it is not possible to tell for certain, although none of the materials noted in the repair records indicate that any switch was involved. The records indicated that the causes of the prior derailments could similarly not be determined.

After hearing arguments on the Railroad's Motion in Limine to exclude evidence of the prior derailments, Judge Davis agreed that they were of no probative value to the case and were potentially inflammatory and confusing to the jury. He accordingly applied his discretion and granted the motion, citing Federal Rule of Evidence 403. Petitioner's counsel conceded that he had no other evidence of any negligence on

the part of the Railroad which could have caused or contributed to the subject occurrence. Petitioner's counsel further acknowledged that in the absence of the excluded evidence of prior derailments he would be proceeding solely on a theory of res ipsa loquitur.

Petitioner sought to proceed on a res ipsa loquitur theory because there has never been any explanation of the cause of the partial derailment at issue. The cars were checked immediately after the occurrence and no defects were found. The switch and immediately adjacent track were damaged in the partial derailment and thus could not offer evidence of the occurrence's cause. The Railroad noted that Petitioner had exclusive control over the instrumentalities involved in the occurrence, and admittedly had the exclusive responsibility to check them before giving a signal to proceed.

Accordingly, the Railroad argued that the occurrence was either due to Petitioner's own sole negligence, or some unexplained cause arising out of instrumentalities fully within his control at that time of the occurrence. The U.S. District Court ultimately granted the Railroad's motion for judgement as a matter of law.

On appeal, the United States Court of Appeals for the Fourth Circuit agreed and affirmed the lower court's decision. Specifically, the Fourth Circuit found that the trial court did not abuse its discretion in precluding Petitioner from introducing evidence of prior unrelated derailments. Additionally, the court found Petitioner's claims invoking the doctrine of res ipsa loquitur without merit, because the Petitioner failed to demonstrate that the subject partial derailment ordinarily would not have occurred in the absence of negligence and that the Petitioner failed to demonstrate that the Railroad alone controlled the switch and cars involved in the event. Petitioner then filed a petition of rehearing which was denied.

On December 13, 1996, the Petitioner filed this petition for writ of certiorari to this Court which was docketed on December 18, 1996.

REASONS FOR DENYING THE WRIT

Rule 10 of the United States Supreme Court Rules clearly establishes that the jurisdiction of the United States Supreme Court is strictly limited. Rule 10 states, "[a] petition for writ of certiorari will be granted only when there are special and important reasons therefor." Furthermore, this rule provides, "[a] petition for a writ of certiorari is ***rarely*** granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." (Emphasis added). Given the facts of this case, the Petitioner completely fails to meet any of these requirements because there are no special and important reasons for this Court to grant this petition. In fact, the Petitioner concedes in his petition that the Fourth Circuit's decision does not change the state of the current law which this Court has established. The Supreme Court does not sit for the benefit of particular litigants. Rice v. Sioux City Cemetery, 349 U. S. 70, 74, 75 (1955)(citations omitted). (Petition, p. 18). Jurisdiction in this Court is not exercisable merely to give a party who did not prevail in the Circuit Court of Appeals another hearing. See Magnum Import Co. v. Coty, 262 U.S. 159 (1923).

Given the strict jurisdictional requirements for review of a case by the United States Supreme Court, the Petitioner offers no compelling reasons why this case should be reviewed by this Court. Even assuming *arguendo* that the Fourth Circuit's opinion is incorrect with respect to the facts of this case, the Fourth Circuit's statement of the law is correct and does not entail an aberration of existing common or statutory law necessary for correction by the United States Supreme Court.

I. The Fourth Circuit Correctly Affirmed The District Court's Decision To Act Within Its Sound Discretion In Granting The Railroad's Motion In Limine Excluding Evidence Of Prior Unrelated Derailments Where Thousands Of Cars Travelled Through The Same Switch Between The Last Prior Derailment And The Subject Occurrence, Where The Prior Occurrences Did Not Occur Under Substantially Similar Circumstances, Where There Was No Evidence That Any Of The Prior Derailments Occurred At The Switch At Issue, And There Was No Evidence Of Negligence In Any Of The Prior Derailments.

Petitioner proffered evidence of several prior unrelated derailments in an attempt to show that the Railroad breached its duty to provide its employees a safe place to work and to show an absence of contributory negligence. The trial court granted the Railroad's Motion in Limine barring such evidence, finding that under Rule 403 the probative value of that evidence did not outweigh the likelihood of unfairness, confusion of the issues, and delay that would have been occasioned. Recognizing that such a decision was entirely within the trial court's purview, the Fourth Circuit found that the trial court did not abuse its discretion. (Fourth Circuit Opinion, Petitioner Appendix, App. 6).

The prior unrelated derailments the Petitioner attempted to rely upon did not occur under substantially similar circumstances to the partial derailment involved in this case. (Fourth Circuit Opinion, Petitioner Appendix, App. 6). Evidence of prior occurrences is only admissible where they "have occurred under substantially similar circumstances." Edward v. Consolidated Rail Corp., 576 F. Supp. 1087, 1105 (D.D.C. 1983), aff'd, 733 F.2d 966 (D.C. Cir. 1984), cert. denied, 469 U.S. 883 (1984); Sears, Roebuck & Co. v. Copeland, 110 F.2d 947, 949 (4th Cir. 1940) (prior accidents

must have occurred "under substantially the same conditions, at substantially the same place ... and at a time not too remote."). See also Sparks v. Gilley Trucking Inc., 992 F.2d 50 (4th Cir. 1993) (reversing and remanding because evidence of prior speeding tickets was improperly admitted by the trial court).

Here, the circumstances of the subject partial derailment differ dramatically from the prior occurrences. The most recent of the prior derailments occurred on February 10, 1993, nine days before the partial derailment at issue. This heavily trafficked area in the heart of the Bethlehem Steel plant undisputedly had several thousand railroad cars, many loaded with steel, travel over it in those nine days. Petitioner's crew had railroaded cars through the 229 switch several times earlier in the same shift before the occurrence without incident. In fact, the very same set of railroad cars had been railroaded through the same switch immediately before the occurrence at the switch, in the course of the move in question. It would be patently absurd to suggest that there was some unsafe condition which caused or contributed to one of the prior unrelated derailments (which there is no evidence of), but which in turn permitted several thousands of cars through the same switch without incident, including the very same car at issue, before somehow causing the subject occurrence. Moreover, Petitioner himself claims that he visually inspected the track, switch, and cars in question immediately before the occurrence and, based upon his seventeen years of experience during which he had thrown hundreds of switches, saw no indication of any defect or condition which could cause or contribute to a derailment.

There is absolutely no evidence that any of the prior derailments occurred at the switch at issue here. The Railroad maintains repair records which indicate the location of all repairs and the repairs performed. These records affirmatively indicate that at least two of the derailments did not occur at any of the three switches on track 229. For the other two, it is

impossible to tell for certain whether they occurred at a switch or not, but the materials used in the repairs do not indicate that a switch was involved.

There is also absolutely no evidence of any negligence causing or contributing to any of the prior derailments. Moreover, there could be no possible causal relationship between the prior events and the subject occurrence, due to the enormous number of cars going through the switch without incident since the last prior derailment. To allow such evidence would force the Railroad to try the case for all five derailments, instead of the lone one at issue. The Fourth Circuit appropriately recognized that the proffered evidence is of no probative value and is highly prejudicial because it would allow jurors to improperly infer negligence in this case from prior derailments which, themselves, have never been alleged or found to be due to any negligence on the part of the Railroad. (Fourth Circuit Opinion, Petitioner Appendix, App. 6).

There are a number of cases among both federal and state courts supporting this decision and demonstrating that there is no confusion among the federal circuit courts requiring clarification by the United States Supreme Court. Courts consistently find evidence of prior occurrences inadmissible where the circumstances of the prior events are not sufficiently similar to that at issue. Amatucci v. Delaware and Hudson Railway Co., 745 F.2d 180 (2d Cir. 1984) (FELA case reversed and remanded for a new trial because of admission of evidence of prior heart attacks suffered by other engineers); Kelsay v. Consolidated Rail Corp., 749 F.2d 437 (7th Cir. 1984) (affirming the trial court's decision to exclude evidence of two prior accidents at the same railroad crossing); Horn v. Chicago, Rock Island & Pacific Railroad Co., 357 P.2d 815 (Kan. 1960) (affirming exclusion of evidence of prior collision at railroad crossing).

Even Cereste v. New York, New Haven and Hartford Railroad Co., a case heavily relied upon by Plaintiff, states that

evidence of prior instances of coal falling out of railroad cars "could not have been prejudicial in light of the overwhelming proof that coal had so fallen on that path at the approximate time of the accident." 231 F.2d 50, 53 (2d Cir. 1955), cert. denied, 351 U.S. 951, 76 S. Ct. 848 (1956). In the case at bar, there is no such corroborating evidence of negligence in any of the prior occurrences.

Where prior occurrences or acts do not occur under substantially similar circumstances, they are inadmissible. (Fourth Circuit Opinion, Petitioner Appendix, App. 6). Here, the proffered prior events clearly did not occur under substantially similar circumstances because they occurred nine days, or more, earlier on a track which had been travelled through uneventfully by thousands of cars, including the car at issue, in the interim. There is no evidence that any of the prior derailments occurred at the switch at issue here, and there were no allegations or findings of negligence in any of the prior occurrences. Such evidence is highly prejudicial and inflammatory and was properly excluded pursuant to Rule 403.

Petitioner proffered evidence of the prior acts as evidence of a breach of some duty on the part of the Railroad, or, in the alternative, as evidence of an absence of contributory negligence on Petitioner's part. Neither of these bases for admission are appropriate. "Evidence of other ... acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ... ." Fed. R. Evid. 404(b) (1995). Evidence of other acts, however, cannot be used to prove negligence itself. Likewise, such evidence is not relevant to the issue of contributory negligence. Plaintiff was not involved in any of the prior unrelated occurrences, and thus their admission would not tend to make the determination of contributory negligence more or less probable. See Fed. R.

Evid. 401, 402 (1995). Evidence of prior unrelated derailments is inadmissible on both grounds for which it was proffered by Petitioner, and, indeed, is inherently inadmissible because of its tendency to unfairly prejudice the jury.

Indeed, the only conceivable relevance of this evidence would be to show notice of an unsafe condition under a negligence theory of the case.[2] However, considering that thousands of railroad cars had travelled over this area without incident since the last prior derailment, that the very car at issue had travelled over the switch without incident, that there was no evidence of negligence in any of the prior derailments, and that Petitioner himself inspected the area and considered it safe before signaling, it would be absurd to suggest that any of these prior occurrences provided the Railroad with notice of any unsafe condition.

Admission of evidence, particularly potentially prejudicial evidence, is generally left to the sound discretion of the trial judge. Larkins v. Farrell Lines, Inc., 806 F.2d 510, 515 (4th Cir. 1986), cert. denied, 481 U.S. 1037, 107 S.Ct. 1973 (1987). ("The Rule 403 balance is essentially a matter of trial conduct; 'if judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.'") (citation omitted). Such a decision should only be overturned where there is a clear abuse of that discretion.

The Fourth Circuit recognized that the trial court properly considered the fact that there is no evidence that any of the prior occurrences happened at the switch at issue; that thousands of railroad cars had travelled through the switch in question without incident since the last derailment; that the very same car travelled through the subject switch without incident immediately before the occurrence; and that there

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[2] This evidence, in fact, was Plaintiff's only proffered evidence of negligence and is clearly insufficient to support a finding of negligence. Moreover, it is not relevant to a res ipsa loquitur theory.

were no allegations or findings of negligence for any of the prior occurrences, in finding that the proffered evidence of prior derailments would be inadmissible under Rule 403. (Fourth Circuit Opinion, Petitioner Appendix, App. 5-6). The prior derailments did not occur under substantially similar circumstances to the occurrence at issue. They were proffered for the improper purposes of proving negligence itself, or lack of contributory negligence, issues on which the proffered evidence is not relevant. As discretion rested squarely with the trial judge to weigh the probative value of such evidence, or lack thereof, against the confusion, prejudice and delay which would be created by its admission, the Fourth Circuit found that the trial judge acted well within his sound discretion in excluding such evidence, and accordingly affirmed that decision. (Fourth Circuit Opinion, Petitioner Appendix, App. 6).

II. Given the facts of this case, the Fourth Circuit's opinion is consistent with the precedent established by the United States Supreme Court with respect to the doctrine of res ipsa loquitur as applied in FELA cases.

The Federal Employers' Liability Act (FELA) provides that "[e]very common carrier by railroad ... shall be liable in damages to any person suffering injury while he is employed by such carrier ... for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51 (1986). Enacted in 1908, this statute eliminated several common-law tort defenses that had effectively barred recovery by railroad workers, abolishing the fellow servant rule and contractual waivers, rejecting contributory negligence in favor of comparative negligence and, in a 1939 amendment, abolishing the assumption of risk defense. Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396, 2404 (1994).

Congress chose not to subject railroad employees to a no-fault workers' compensation scheme which carries with its limited burden of proof a similarly limited benefit scheme. See, id. Instead, the FELA requires employees to prove fault in order to recover, but as a sequential trade-off, allows them to seek common law tort damages, which can far exceed workers' compensation benefits. Although the FELA provides a relaxed standard, by abrogating or modifying certain specific common-law defenses to liability, it is expressly not a no-fault workers' compensation statute. Id. Indeed, the FELA follows traditional common-law rules unless they are specifically and explicitly rejected in the text of the statute. Id. As this Court recently reiterated, "[w]e have insisted that FELA 'does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.'" Id. (quoting Ellis v. Union Pacific Railroad Co., 329 U.S. 649, 653, 67 S. Ct. 598, 600 (1947)). See also Inman v. Baltimore & Ohio Railroad Co., 361 U.S. 138, 140, 80 S. Ct. 242, 244 (1959); Healy v. Pennsylvania Railroad Co., 184 F.2d 209, 213 (3d Cir. 1950).

The common-law doctrine of res ipsa loquitur literally means that "the thing speaks for itself." Sweeney v. Errving, 228 U.S. 233, 238, 33 S. Ct. 416, 418 (1913). In order to make out a prima facie res ipsa loquitur case, a plaintiff must establish that: (1) the event is of a type which ordinarily does not happen in the absence of someone's negligence; (2) the instrumentality causing the injury was, at the time of the accident, within the exclusive control of the defendant; and (3) the accident was not due to any voluntary action on the part of the plaintiff. Stillman v. Norfolk & Western Railway Co., 811 F.2d 834 (4th Cir. 1987); Larkins v. Farrell Lines.Inc., 806 F.2d 510 (4th Cir. 1986), cert. denied, 481 U.S. 1037, 107 S.Ct. 1973 (1987). The application of res ipsa loquitur has been properly limited to only those FELA cases where these elements are met. See Stillman 811 F.2d at 836-37. Res ipsa

loquitur is a rule of evidence which does not shift the burden of persuasion but only shifts the burden of production. Ramsouer v. Midland Valley Railroad Co., 135 F.2d 101, 106 (8th Cir. 1943); Sweeney, 228 U.S. at 238.

To prevail under the FELA, a plaintiff must prove that he or she was injured as a result of some negligence on the part of the Railroad. Atlantic Coast Line Railroad Co. v. Temple, 285 U.S. 143, 147, 52 S. Ct. 334, 336 (1932). In Atlantic Coast Line Railroad Co. v. Craven, the Fourth Circuit reversed an FELA jury verdict in favor of the employee plaintiff where there was no evidence of the railroad's negligence, stating: "[t]his case must be reversed because there was no substantial evidence upon which the question of negligence could have been submitted to the jury. Although decisions under the Act are most liberal in allowing employees to recover, it has been reaffirmed time and again that recovery lies only upon the concurrence of negligence and injury as cause and effect." 185 F.2d 176, 178 (4th Cir. 1950), cert. denied, 340 U.S. 952, 71 S. Ct. 571 (1951). "The great majority of railroad accidents ... could by some means be prevented. The test is whether reasonable men, examining the circumstances and the likelihood of injury, would have taken those steps necessary to remove the danger." Craven at 179. In the case at bar, as in Craven, the "chances of injury to plaintiff, however, were no greater than those inherent in his type of employment." Craven at 179.

To prove negligence, plaintiff must provide more than just evidence of an accident. "The mere happening of an accident, ... does not give rise to a res ipsa inference of negligence or breach of duty." Larkins at 512. "Where varying explanations are equally probable, res ipsa loquitur cannot apply." Id. "[F]ar too little is known of the facts ... to 'let the thing stand for itself.'" Id. at 513. As the Supreme Court made clear in Herdman v. Pennsylvania Railroad Co., if the "proofs do not meet the tests laid down by this Court in Jesionowski," then a jury question under res ipsa loquitur is not presented in

an FELA case. 352 U.S. 518, 520, 77 S. Ct. 455 (1957) (citing Jesionowski v. Boston & M.R.R., 329 U.S. 452, 67 S. Ct. 401 (1947)).

The Petitioner attempts to rely on the common-law doctrine of res ipsa loquitur for submission of the herein case to the jury. However, as the Railroad argued, and both lower courts correctly found, res ipsa loquitur cannot be applied in this case because under traditional common-law rules of res ipsa loquitur Petitioner fails to meet the elements necessary to make out a jury question.

The Fourth Circuit correctly held that Petitioner fails to meet each of the three prongs of the res ipsa loquitur test. (Fourth Circuit Opinion, Petitioner Appendix, App. 6). It is noteworthy for this Court to recognize that with respect to determining whether the Fourth Circuit deviated from current law, courts must not over-extend res ipsa loquitur in FELA cases so as to arbitrarily create liability where the injury occurred without negligence on the part of the employer railroad, as that would be contrary to the letter and spirit of the FELA. The "question of whether the facts warrant submission to a jury on a res ipsa theory is of a different nature, owing to the strictures of that theory designed to prevent a jury from speculating as to negligence, rather than properly inferring its existence from circumstantial evidence." Moser v. Agway Petroleum Corp., 866 F. Supp. 262, 263 (D. Md. 1994), aff'd, 67 F.3d 296 (4th Cir. 1995). The FELA does not make the employer an insurer for all injuries, and the doctrine of res ipsa loquitur cannot be used to improperly achieve that same end. See Gottshall, 114 S. Ct. 2396, 2409 (1994); Inman v. Baltimore & Ohio Railroad Co., 361 U.S. 138, 140, 80 S. Ct. 242, 244 (1959); Healy v. Pennsylvania Railroad Co., 184 F.2d 209, 213 (3d Cir. 1950). The Fourth Circuit recognized the importance of not over-extending the res ipsa loquitur theory, and therefore, determined that to allow this case to go to the jury on a theory of res ipsa loquitur would be tantamount to imposing strict liability on the Railroad, a result

specifically prohibited by the legislature and the United States Supreme Court. See (Fourth Circuit Opinion, Petitioner Appendix, App. 14-15).

As recognized in Moser v. Agway Petroleum Corp., the "first and foremost requirement" to make out a res ipsa loquitur case is that the accident would not have occurred in the absence of negligence. 866 F. Supp. 262, 263 (D. Md. 1994), aff'd, 67 F.3d 296 (4th Cir. 1995) (finding insufficient evidence that a reasonable rational jury could infer that explosions of old radiators only occur because of negligence where there is no other evidence of negligence besides the plaintiff's own). If this first prong is not met, the plaintiff has not presented a jury question on a res ipsa loquitur theory. Herdman v. Pennsylvania Railroad Co., 352 U.S. 518, 77 S. Ct. 455 (1957) (plaintiff in FELA case failed to prove that unscheduled and sudden stops of train are extraordinary and thus did not present a jury question under the theory of res ipsa loquitur). (Fourth Circuit Opinion, Petitioner Appendix, App. 12).

Petitioner here failed to proffer any evidence that derailments never occur in the absence of negligence. In contrast, the Railroad proffered uncontradicted evidence that derailments can and do at times occur, in the ordinary course of railroading, totally without explanation and without negligence. As both lower courts readily acknowledged, railroad cars do derail in the absence of negligence by the railroad. (Fourth Circuit Opinion, Petitioner Appendix, App. 8-9).

Petitioner relies on Jesionowski v. Boston & M.R.R., for the proposition that, as a matter of law, derailments never occur in the absence of negligence. 329 U.S. 452, 67 S.Ct. 401 (1947). (Fourth Circuit Opinion, Petitioner Appendix, App. 12). In Jesionowski, the Court found that a jury question was presented under a res ipsa loquitur theory where the plaintiff had been killed in the accident and thus was unavailable to testify, and where the Court noted specific facts surrounding

the occurrence from which negligence could be implied. Focussing on the exclusive control element of res ipsa loquitur, the Court expressed concern that where an employee's injury was fatal, the employee would be unable to prove exclusive control by the railroad, and the case would never reach the jury. Thus, Jesionowski must be viewed in the context of the Court's concern and focus on the exclusive control element of res ipsa loquitur and the inability of the plaintiff to testify regarding the conditions involved in his death in the occurrence, as well as the other corroborating evidence of negligence.

Petitioner attempts to read Jesionowski as standing for the proposition that, as a matter of law, derailments only ever occur because of negligence. This overly broad reading of Jesionowski, however, fails to consider the other evidence of negligence in that case, including evidence of a "frog" of a switch operated with a spring mechanism that could have caused the derailment, and evidence of splinters and planks on the track near the frog which could also readily have caused the derailment. Id. at 455. The case falls far short of creating a legal standard whereby all derailments, regardless of other factors, as a matter of law, only occur as a result of negligence.

Both lower courts correctly stated and applied the holding of this Court in Jesionowski. In applying that law, each court determined that a derailment by itself is insufficient as a matter of law to invoke the theory of res ipsa loquitur.

Petitioner has provided absolutely no affirmative evidence that derailments only occur as a result of negligence. On the contrary, the Railroad proffered undisputed evidence, including the Petitioner's own testimony, that derailments can and do occur, in the ordinary course of railroading, without any apparent reason or cause whatsoever. No such evidence was apparently offered to the Jesionowski Court. Thus, if Jesionowski does not, as both the trial court and Fourth Circuit correctly found, create a legal presumption that derailments only occur because of negligence, then Petitioner has failed to

meet his burden of proof on this element of res ipsa loquitur, and the judgments below in favor of the Railroad should remain undisturbed as no further clarification of the law by this Court is necessary.

The Railroad did not, as required in order for Petitioner to make out a prima facie case under a res ipsa loquitur theory, have exclusive control of the instrumentalities involved in the occurrence. On the contrary, Petitioner himself admittedly exerted exclusive control over them at the time in question. Petitioner alone was responsible for verifying that the switch was thrown and latched correctly, and for verifying that it was safe to proceed. There is no proximate cause of the injury where Petitioner himself controlled the instrumentalities and acts which precipitated the injury.

As the Fourth Circuit reiterated in the FELA case of Stillman v. Norfolk & Western Railway Co., "[i]n the absence of exclusive control by the Railroad over the instrumentality that injured [the plaintiff], the doctrine of res ipsa loquitur could not properly be applied to create an inference of negligence on the part of the Railroad." 811 F.2d 834, 837 (4th Cir. 1987). In Stillman, the Fourth Circuit affirmed a verdict in favor of the railroad where the plaintiff had placed himself partially under forklift blades in an attempt to free the attached chain from the blades. Id.

In this case, the Fourth Circuit recognized, consistent with its decision in Stillman, that any control of the instrumentalities in question by the Railroad was exercised at least partially through Petitioner himself. (Fourth Circuit Opinion, Petitioner Appendix, App. 12). Petitioner alone was, by his own admission, responsible for switching, latching, verifying that there were no gaps, and signalling only if it was safe to proceed. With Petitioner having exerted such total control over the instrumentalities involved, it is inconceivable that the Railroad could be found to have exerted exclusive control over them. Because this second element of res ipsa

loquitur is not met, Petitioner has failed to make out a jury question under a res ipsa loquitur theory.

To present a jury question under res ipsa loquitur, a plaintiff must prove that the occurrence was not due to his or her own voluntary act. Larkins v. Ferrell Lines, Inc., 806 F.2d 510, 513 (4th Cir. 1986), cert. denied, 481 U.S. 1037, 107 S. Ct. 1973 (1987). In other words, the plaintiff must prove that there was no contributory negligence. Here, either the occurrence was necessarily caused by the negligence of Petitioner himself, or it was not caused by any negligence at all. Thus, if Petitioner was not contributorily negligent, then there is no negligence at all.

In Hurley v. Patapsco & Back Rivers Railroad Co., the Fourth Circuit affirmed judgment as a matter of law in favor of this same railroad where an FELA plaintiff's own negligence was the sole proximate cause of the accident. 888 F.2d 327 (4th Cir. 1989). The plaintiff, an expert machinist, was injured by a lathe when he leaned towards it and it caught his sweater. Id. at 328. The plaintiff offered evidence in his attempt to show that the occurrence was due to negligence on the part of the railroad, including lack of direct light, dirty windows, a shadow from the position of the machine, and previous requests for additional lighting. Id. at 329. The Fourth Circuit, however, in the face of such evidence, stated that: "[a]ppellant's evidence in this case was such that the jury could have reached a verdict in his favor only by speculating." Id. at 329.

In the case at bar, the Fourth Circuit determined Petitioner was, by his own admission, responsible for switching, latching, checking for potential problems, and signalling only when it was safe to proceed. If it was not safe to proceed, it was Petitioner's sole responsibility, which he similarly acknowledged, not to signal the car forward. If the partial derailment at issue occurred as a result of some negligence, it could only be due to Petitioner's "significant role in the events leading to his injuries which demonstrates that

the Railroad did not exclusively control the instrumentalities." (Fourth Circuit Opinion, Petitioner Appendix, App. 14). As such, the third element of res ipsa loquitur is not met, no jury question is presented and the decisions of the two lower courts are correct.

CONCLUSION

Accordingly, the Petitioners have failed to present any issue sufficient to invoke the jurisdiction of the Supreme Court of the United States. For that reason and for all of the foregoing reasons, the Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 96-972

In The Supreme Court of the United States

October Term 1996

RONALD C. MANDRGOC,
Petitioner,

v.

PATAPSCO & BACK RIVERS RAILROAD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO BRIEF IN OPPOSITION

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STATUTES AND RULES INVOLVED IN THE CASE

45 UNITED STATES CODE ANNOTATED

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being

employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

FEDERAL RULES OF EVIDENCE

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it could be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

(b) Other crimes, wrongs, or acts.

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important

matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.